STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. ESAW,

APPELLANT

APPELLATE CASE NO. 2017-002213

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject.

Error Preservation

Respondent argued the issue presented is not preserved for review because "[d]efense [c]ounsel acquiesced to the Court's reasoning that such a charge would constitute a charge upon the facts, impermissible under South Carolina law." BOR at 9. Respondent, while citing the relevant page numbers of the trial transcript, misapprehends what occurred at the trial and how the law applies to those facts.

Trial counsel requested the judge provide the jury with a specific instruction. Tr. 661, ll. 3-10. The judge then inquired about New Jersey and South Carolina permitting "a judge to charge on the facts." Tr. 661, ll. 11-21. Ultimately, the judge refused to instruct the jury as requested. Respondent argued that because trial counsel did not "press the request for the instruction further," Respondent "acquiesced to the Court's reasoning that such a charge would constitute a charge upon the facts, impermissible under South Carolina law." BOR at 7; BOR at 9. In other words, it is Respondent's contention that the error preservation rules require defense counsel to raise the issue to the trial judge, obtain a ruling, and argue further with the trial judge regarding an adverse ruling in direct contravention of the Rules of Criminal Procedure. See Rule 18, SCRCrimP. Specifically, "[c]ounsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." Rule 18(a), SCRCrimP. Additionally, argument on the conduct of trial is not even permitted "unless specifically

requested by the court." Rule 18(b), SCRCrimP. Thus, in order to satisfy the high burden espoused by Respondent to preserve an error for review, one would be required to violate the South Carolina Rules of Criminal Procedure. Such a requirement simply cannot be the law.

According to Respondent the issue is not preserved because trial counsel "never argued why the trial court's instruction was not sufficient and did not argue why the court's reasoning regarding factual instructions was not proper under the circumstances of the case." BOR at 10. Additionally, Respondent faults trial counsel for failing "to articulate any factual explanation to the trial court as to why this specific instruction was needed, why the trial court's instruction would be in error, and failed to articulate the arguments now presented on appeal." BOR at 10. Based upon Respondent's presentation in its brief, it appears Respondent wants South Carolina to adopt a new form of error preservation – even more stringent than the one currently used – and require trial counsel to articulate all arguments in support of a position before the trial judge. In essence, Respondent wants the trial lawyers to prepare appellate briefs and make appellate arguments for each issue presented in a case. Thus, appeals would be reduced to appellate judges simply reading the transcripts with no need for the assistance of appellate counsel. Quite simply, Respondent's position goes too far.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Id. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406,

412, 529 S.E.2d 543, 546 (2000)(quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. The rationale of issue preservation is to prevent "a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

An appellant may waive his right to appeal a decision by the trial judge through acquiescence. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006). Acquiescence occurs when one agrees with the trial judge's ruling. In State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998), the Supreme Court held appellant acquiesced in the judge's limitation of his cross-examination by responding to the judge's ruling that appellant could ask the witness about pending charges, but could not go into the specifics by saying, "Right." In State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007), the Court discussed counsel's "acknowledgment to the trial court that the absence of certain documents would not be prejudicial to the defense" was acquiescence in the trial judge's ruling that he was not denied a fair trial due to the state not turning those records over sooner, which was the subject of the appeal. Finally, this Court held an issue conceded in trial court could not be argued on appeal where the appellant contended on appeal that his case was not under the Tort Claims Act, but informed the trial judge that the complaint was, in part, under the Act. Ex Parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). Defense counsel never agreed with the trial court's ruling regarding his request for a specific jury instruction concerning eyewitness identification.

Defense counsel did everything that was required of him to preserve his request for a specific instruction on eyewitness identifications. Counsel presented the judge with his proposed instruction, including case law to support the instruction. The proposed instruction was made a part of the record. Counsel's decision not to argue further with the trial judge was in keeping with counsel's duties under the Rules of Professional Conduct and the Rules of Criminal Procedure.

State v. Green

Appellant acknowledges this Court addressed a similar request in State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). While Appellant disputes this Court's determination in Green that "some" of the requested charges "would have been improper instructions into matters of fact or comments on the weight of the evidence," Appellant's request to charge did not include the language found improper in Green. See Green, 412 S.C. at 77, 770 S.E.2d at 431. Specifically, Appellant requested the following:

> When a witness who is a member of one race identifies a member who is of another race, we see that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or accuracy of the subsequent identification.

Tr. 660, l. 21 – Tr. 661, l. 10; see also R. *(Court's Exhibit #3). This Court found the sentence that "[i]dentification by a person of a different race may be less reliable than identification by a person of the same race" to be an improper charge on the facts. Green, 412 S.C. at 77, 770 S.E.2d at 431. Despite Respondent's contention in its brief, Appellant's requested instruction did not include the offending language from Green. Thus, the issue presented is not controlled by Green. Finally, the requested language was not a charge on the facts. The proposed instruction was clear that the jury "may consider," "whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or accuracy of the subsequent identification." Such

an instruction in no way indicated to the jury the judge's opinion on the credibility of a witness, the weight of the evidence, or the guilt of the accused.

Not harmless beyond a reasonable doubt

"Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt." State v. Henson, 407 S.C. 154, 166-167, 754 S.E.2d 508, 515 (2014) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). Respondent argued the judge's failure to give the requested instruction was harmless because of Respondent's statement to police and the testimony of his co-defendant, Pitts. Turning to Respondent's argument that Respondent's statement to police, which Respondent claimed amounted to a "signed written confession," was enough to determine the judge's failure to give the instruction was harmless, it must be noted Respondent begrudgingly admitted Appellant implicated himself only as a driver of the car in which the shooter was the passenger. IBOR at 14. Respondent also admitted that at best, the state's case against Appellant based solely on his statement would be under an accomplice liability theory. IBOR at 14. Appellant denied being involved in the shooting at all. Appellant's statement to police differed significantly from the testimony of the state's only eyewitness – Franklin Vasquez. Franklin claimed Appellant got out of the car and held a gun to Franklin's head. Tr. 143, l. 25 – Tr. 145, l. 6. He even claimed Appellant tried to shoot the gun, but it jammed. Tr. 145, ll. 4-6. Appellant's statement to police is a far cry from the evidence this Court and the Supreme Court have found overwhelming evidence of guilt to support a harmless error argument.

The Supreme Court discredited the testimony of co-defendants when conducting a harmless error analysis. Henson, 407 S.C. at 167, 754 S.E.2d at 515. The Court explained that the co-defendants in that case "both faced charges for their participation in the crimes and thus, had an incentive to downplay their involvement and shift blame to others." Id. Similarly, Pitts admitted he

was charged with murder, attempted murder, three counts of armed robbery, obstruction of justice, and possession of a weapon. Tr. 572, l. 19 – Tr. 573, l. 2. He also admitted that he was "facing a lot of time." Tr. 573, ll. 3-5. Thus, like the co-defendants in Henson, Pitts had an incentive to shift blame to Appellant and his testimony lacks any merit in a harmless error analysis as a result.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Ricky Esaw, #273842, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of February, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.